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No. 1

In The

# Supreme Court of the United States

SUSAN F. KUHN and MICHAEL KUHN,

*Petitioners,*

vs.

SULZER ORTHOPEDICS, INC., TOMMY JACKS, INDIVIDUALLY, TOMMY JACKS, P.C., and MITHOFF & JACKS, L.L.P.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Under FED. R. APP. P. 4(a)(6) the district court "may" reopen the time to file an appeal if: (i) the moving party did not receive notice under FED. R. CIV. P. 77(d) of the entry sought to be appealed within 21 days after entry; (ii) the motion is filed the earlier of 180 days after the judgment or order is entered or within seven days after the party receives notice; and (iii) no party would be prejudiced.

When a moving party has met all the conditions of FED. R. APP. P. 4(a)(6) with uncontroverted evidence, may the district court in its discretion deny relief based upon the failure of the party to monitor the court's docket, *i.e.*, as part of its discretion to deny relief under 4(a)(6), can it impose upon a party 4(a)(5)'s requirement of "excusable neglect or good cause"?

If not, what are the factors a district court may consider in denying relief under FED. R. APP. P. 4(a)(6) when all of its elements have been met with uncontroverted evidence?

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## PETITION FOR A WRIT OF CERTIORARI

Susan and Michael Kuhn (the "Kuhns") respectfully petition this Court for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

## OPINION AND PROCEEDINGS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit affirming the district court's order dated August 10, 2007, has been ordered published. It is reproduced in Appendix A of this petition.

The judgment of the U.S. District Court for the Northern District of Ohio is dated March 14, 2005. It is reproduced in Appendix B of this petition.

## STATEMENT OF THE BASIS FOR JURISDICTION

The appellate jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the U.S. Court of Appeals for the Sixth Circuit sought to be reviewed was entered August 10, 2007. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed.

## FEDERAL RULE INVOLVED IN THIS CASE

*This case involves the construction and application of* FED. R. APP. P. 4(a)(6):

> *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
>
> (B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
>
> (C) the court finds that no party would be prejudiced.

Federal Rule of Appellate Procedure 4(a), and the advisory committee notes associated with that rule, are reproduced in Appendix C.

## STATEMENT OF THE CASE

### I. Susie Kuhn and Sulzer Orthopedics Defective Implant

Susie Kuhn was the unfortunate recipient of two orthopedic hip implants involving defective prostheses manufactured by Sulzer Orthopedics ("Sulzer"). Due to a

defect in the manufacturing process, the Sulzer prosthetic devices contained a lubricant that prevented them from bonding with the patient's pelvis.

## II. The Kuhns Hire Texas Lawyer, Jacks

Susie Kuhn and her husband Michael (the "Kuhns") hired a local Corpus Christi, Texas, lawyer to represent them in a products liability lawsuit against Sulzer, and he referred the case to a lawyer from Austin, Texas, named Tommy Jacks. In addition to representing the Kuhns, Tommy Jacks ("Jacks") represented a number of other individual claimants with claims against Sulzer.

## III. The Sulzer MDL, Class Action and Class Action Settlement

Numerous suits were filed against Sulzer around the United States in both federal and state courts. Jacks brought suit on behalf of the Kuhns in Texas state court. An MDL was formed, and all pending Sulzer cases in the federal system were transferred to the United States district court in the Northern District of Ohio, where Judge O'Malley was appointed the transferee judge. After the formation of the MDL and the transfer of cases, the district court provisionally certified the *Sulzer* MDL as a class action, and preliminarily approved a class-action settlement agreement.[1]

The Kuhns were members of the class, but had the right to opt-out and received notice to that effect. Jacks

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[1] *In re: Sulzer Orthopedics, Inc. Hsp. Prosthesis and Knee Prosthesis Products Liability Litigation*, Cause No. 1:01-CV-900.

advised the Kuhns to remain in the class and not exercise their opt-out rights. Following that advice, the Kuhns did not opt-out of the class action, and therefore became bound by the class action settlement. The class action settlement provided for various monetary payments to the members, and included attorney's fees. The Kuhns did not know, and were never told, that Jacks had a personal financial interest in not pursuing the individual suit he had brought for the Kuhns and in advising the Kuhns not to opt-out of the class action. That financial benefit was in the form of bonus "common benefit" attorney's fees awarded to non-class counsel who provided valuable services on behalf of the class, among which non-class counsel Jacks was preeminent.

## IV. The Kuhns Sue Lawyer Jacks in Texas State Court

The Kuhns received some, but not all, of the benefits to which they were entitled under the *Sulzer* class action settlement. Because Jacks failed to comply with a filing deadline imposed by the class settlement agreement, the Kuhns did not receive their Extraordinary Injury Fund (EIF) benefits under the class action settlement.

The Kuhns therefore brought suit against Jacks in Texas state court asserting claims of professional negligence, as well as breach of fiduciary duty and violations of the Texas Deceptive Trade Practice Act (DTPA).[2] As part of their efforts to prove up their state law claims against

[2] *Susan F. Kuhn, et al. v. James "Buddy" Bell, et al.*, Cause No. 03-62285-2 in County Court at Law No. 2, Nueces County, Texas.

Jacks, the Kuhns sought discovery against Sulzer Orthopedics.

## V. District Court in Ohio Enjoins Texas Suit

Though it was not a party to the Kuhns' claim against Texas attorney Jacks in state court, Sulzer blocked discovery by filing an emergency motion in the *Sulzer* class action lawsuit in the United States District Court for the Northern District of Ohio. The district court granted a temporary injunction against the Kuhns and scheduled a hearing on a permanent injunction. Thereupon, Jacks seized the moment and filed his own motion for injunctive relief and requested declaratory relief.

Following a hearing, the district court granted a permanent injunction in favor of Sulzer and Jacks and against the Kuhns. It also ruled on the merits of some of the Kuhns' claims against Jacks pending in Texas state court by enjoining their prosecution and, with respect to the claims the district court deigned to allow, dictating the applicable measure of damages:

> This Court agrees with Sulzer and Jacks that Kuhn is entitled to pursue a claim against Jacks for malpractice, premised on Jacks' failure to timely file [*sic*] the EIF claim form. . . . At this juncture, the Court concludes Kuhn should be permitted to pursue her malpractice action against Jacks in Texas state court. . . . Pursuant to such a claim, Kuhn could seek the equivalent of any EIF benefits she would have received but for the late filing, reasonable interest from the date on which such benefits likely would have been awarded, and, if permitted under Texas law, other compensatory damages flowing directly

from the late filing – for example, reasonable attorney fees incurred in pursuing the equivalent of an EIF award. Kuhn is free to pursue that claim in Texas state court. . . . The Court [however] concludes it must enjoin Kuhn from pursuing these [fraud, misrepresentation, breach of fiduciary duty, and deceptive trade practices claims].

* * * *

[T]he Court must conclude that Kuhn cannot prosecute in Texas state court her claims against Jacks for fraud, misrepresentation, breach of fiduciary duty, and deceptive practices, because to do so would: (1) be tantamount to an appeal of this Court's earlier Orders [regarding the *Sulzer* Class Action] and (2) be in breach of § 15.3 of the Settlement Agreement.

* * * *

. . . . Pursuant to the Court's *Injunction Order*, the Settlement Agreement, and the All Writs Act, 28 U.S.C. § 1651(a), Kuhn is hereby permanently enjoined from pursuing claims for fraud, misrepresentation, breach of fiduciary duty, deceptive trade practices, or similar legal theories against Jacks, whether in connection with her existing Texas lawsuit or any other lawsuit. Further, Kuhn is enjoined from challenging (whether directly or indirectly) in her Texas lawsuit or any other lawsuit, and from pursuing discovery regarding: (1) the propriety of, basis for, or amount of any common benefit fee awards; (2) the adequacy of Notice to class members of the terms of the Settlement Agreement; and (3) the fairness, adequacy, or reasonableness of any provision contained in the Settlement Agreement.

This order granting a permanent injunction and adjudicating the merits of some of the Kuhns' state-law claims was issued and entered on October 18, 2005.

## VI. Kuhns Receive No Notice From Court

Unfortunately, neither the Kuhns nor their counsel received any notice from the clerk of that final disposition as required under FED. R. CIV. P. 5 and FED. R. CIV. P. 77. The clerk's records show that notice should have been provided to the Kuhns' counsel by mail, and show the correct mailing address. It is uncontroverted, however, that counsel for the Kuhns never received notice of the final judgment from the clerk or opposing counsel by mail or any other means.

Because the Kuhns never received written notice from the clerk or opposing counsel of the final judgment and permanent injunction, they never had the opportunity to file a notice of appeal within the thirty days required by FED. R. APP. P. 4(a)(1). Similarly, the Kuhns never had the opportunity to file timely any motion under FED. R. APP. P. 4(a)(4) or FED R. APP. P. 4(a)(5) to stay or extend the deadline for filing a notice of appeal.

## VII. KUHNS FILE MOTION UNDER FED. R. APP. P. 4(a)(6) AND MEET ALL PROVISIONS

The Kuhns, however, monitored the docket. As a result, the Kuhns' counsel independently learned of the entry of the order granting a permanent injunction in

favor of Sulzer Orthopedics and Jacks on January 6, 2006.[3] Within four days of learning of the entry of the final order, and within 180 days of its issuance, the Kuhns filed a motion to reopen the time to file an appeal under FED. R. APP. P. 4(a)(6).[4]

All three conditions required by Rule 4(a)(6) were met by the Kuhns with uncontroverted evidence.[5]

## VIII. District Court Denies 4(a)(6) Relief

Although all the elements prerequisite to 4(a)(6) relief were met, the motion was denied by the district court through an order dated March 14, 2006. In her order denying the Kuhns' FED. R. APP. P. 4(a)(6) motion, the district court gave two reasons for exercising discretion against the Kuhns.

First, the district court reasoned that counsel for the Kuhns had an obligation under the MDL to register with the district court's CM/ECF. "The very first Order this Court entered in this [MDL] case [the Practice and Procedure Order] states that 'Counsel **must** be able to receive

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[3] Thus meeting FED. R. APP. P. 4(a)(6)(A)'s provision, which states the appellant must not have received notice of the entry of the judgment within 21 days after its entry.

[4] Thus complying with FED. R. APP. P. 4(a)(6)(B), which requires that a motion to reopen the time to file an appeal must be filed within 180 days of the entry of the order sought to be appealed. In other words, counsel for the Kuhns complied with his duty implied under Rule 4(a)(6) to monitor the docket at least every 180 days.

[5] As the Sixth Circuit observed in its opinion, "Appellees . . . do not dispute that the Kuhns [complied with the three conditions of 4(a)(6)] and, on the record before us, we have no trouble concluding as much." App. 7.

notice from the Court via e-mail.' Docket No. 3 at 2," the district court claimed. The district court then held that the failure of the Kuhns to abide by the Practice and Procedure Order justified the exercise of discretion against them, despite their full compliance with FED. R. APP. P. 4(a)(6). App. 17.

Second, the district court held that the Kuhns' counsel's failure to monitor the docket was a circumstance that it could consider in exercising the discretion to deny a 4(a)(6) motion even when all of its elements were met:

> Harris [the Kuhns' attorney] failed to undertake his simple duty of checking the docket, and he has not given a good explanation for his failure to do so. FED. R. APP. P. 4(a)(6) states that a "district court *may* reopen the time to file an appeal" if certain conditions are met. The Sixth Circuit Court of Appeals has observed that "[t]he rule states that a district court "may" reopen the time for appeal, not that it "must," even if all the requirements of FED. R. APP. P. 4(a)(6) are met. . . . Accordingly, the motion for reopening is denied.
>
> App. 17.

## IX. The Kuhns Appeal, and Sixth Circuit Affirming

The Kuhns appealed the district court's denial of their 4(a)(6) motion. The Sixth Circuit agreed with the Kuhns that the Practice and Procedure Order did not require the Kuhns or their counsel to register with the district court's CM/ECF system. Accordingly, the Sixth Circuit held that the district court's discretionary denial of 4(a)(6) could not be predicated upon a supposed failure to abide by the Practice and Procedure Order. App. 9.

Nevertheless, the Sixth Circuit affirmed the district court on the basis that the Kuhns' counsel's failure to monitor the docket justified the discretionary decision to deny relief under 4(a)(6) even though all the rule's elements had been met. App. 13. In importing an "excusable neglect" standard into 4(a)(6), the Sixth Circuit recognized that it was departing from the law of the Second and Ninth Circuits. Both the Second and Ninth Circuits have excluded any notion of "excusable-neglect" under Rule 4(a)(6) because they have interpreted the rule as expressly intending to exclude that factor as part of the decision to grant relief. While it refused to define the "precise contours of a district court's discretion to deny a Rule 4(a)(6) motion when the requirements of the Rule have been satisfied," the Sixth Circuit in this case rejected the Second and Ninth Circuits' construction of that Rule because it reasoned that "[a]n interpretation of Rule 4(a)(6) that allowed parties to ignore entirely the electronic information at their fingertips would severely undermine the benefits for both courts and litigants fostered by the CM/ECF system. . . . " App. 12.

The Kuhns petition this Court to review the Sixth Circuit's holding that proving "excusable neglect" is a requirement of FED. R. APP. P. 4(a)(6), and therefore is a matter the district court can consider in denying relief under 4(a)(6) though all provisions of that rule are met with uncontroverted evidence.

## REASONS FOR GRANTING THE PETITION

This petition for writ of certiorari should be granted because compelling reasons exist to warrant this Court's

discretionary judicial review. First, the Sixth Circuit's decision in this case is in conflict with the provisions of FED. R. APP. P. 4(a)(6), and contradicts the purpose of that rule. Second, the Sixth Circuit's decision is in conflict with the interpretation given to FED. R. APP. P. 4(a)(6) by the Second and Ninth Circuits; the need to resolve such a conflict gives compelling reasons to review the Sixth Circuit's opinion by writ of certiorari. Third, an important albeit narrow question of law is posed by this case – when (and under what standard) may district court exercise discretion in denying relief under FED. R. APP. P. 4(a)(6) when all the rule's elements have been met? The answer to that important question appears to be beyond the wits of the courts of appeal, and this justifies the Supreme Court's attention to this issue. The confusion regnant in the inferior federal courts, a confusion only exacerbated by the Sixth Circuit's opinion, demands this Court's overriding guidance. *See* SUP. CT. R. 10.

## I. The Rule: Fed. R. App. P. 4(a)(6)

FED. R. APP. P. 4(a)(6) states as follows:

> (6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
>
> (B) the motion is filed within 180 days after the judgment or order is entered or within 7

> days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
>
> (C) the court finds that no party would be prejudiced.

FED. R. APP. P. 4(a)(6).

Rule 4(a)(6) was added to the rules of appellate procedure by amendment effective December 1, 1991.[6] The advisory committee's notes explain the felt need to add Rule 4(a)(6) to the then-existing Rule 4:

> The amendment provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal.[7]

"The amendment," observes one commentator in discussing Rule 4(a)(6), was "intended to reduce substantially the risk that any opportunity to appeal will be forfeited by failure to receive notice of the entry of judgment." 16A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3950.6 (3d ed. 1998). The change in Rule 4 accomplished this by shifting risks and duties among the clerk and the several parties.

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[6] *See* FED. R. APP. P. 4 advisory committee's note, 134 F.R.D. 725, 727. These may be found in the Appendix. *See* App. 21-55.

[7] *See* FED. R. APP. P. 4 advisory committee's note, 134 F.R.D. 744. *See* App. 31.

In providing a limited window to reopen the time to file an appeal, the advisory committee further explained that Rule 4's amendments intended to ameliorate the effect of a strict rule which robbed a party of the right to appeal when the clerk failed to give notice of an appealable order and the losing party did not independently learn of the entry of the order by monitoring the court's docket.

> *The present strict rule imposes a duty on counsel to maintain contact with the court while a case is under submission.* Such contact is more difficult to maintain if counsel is outside the district, as is increasingly common, and can be a burden to the court as well as counsel.[8]

By providing a 180-day absolute deadline for relief under Rule 4(a)(6), the amendment implicitly defined and eased counsel's docket-monitoring duty. Under the rules prior to such amendment, if the clerk failed in his or her duty under FED. R. CIV. P. 77, and counsel for the losing party neglected his or her docket-monitoring duty without excuse, the innocent losing party faced the draconian loss of appellate rights. Importantly, Rule 4(a)(6)'s 180-day deadline did not intend absolutely to relieve counsel from periodically checking the docket, but eased that duty by rule.[9] As one commentator put it, "The 180-day maximum

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[8] *See* FED. R. CIV. P. 77 advisory committee's note, 134 F.R.D. 699 (emphasis added).

[9] In its opinion, the Sixth Circuit overemphasized the Kuhns' argument. "The Kuhns argue that the district court erred in holding that they had a duty to monitor the docket. . . . " App. 11. The Kuhns never argued that they had *no duty* to monitor the docket; rather, the Kuhns argued that, under 4(a)(6), that duty has been ameliorated and defined by 4(a)(6)'s 180-day deadline. The Kuhns complied with that

(Continued on following page)

period for seeking reopening, leaves an incentive to check periodically for the entry of judgment, but reduces the burden of making such checks." 16A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3950.6 (3d ed. 1998).

Obviously, the 180-day provision of FED. R. APP. P. 4(a)(6) came at some expense to the finality of judgments, in that it added some uncertainty in calculating when judgment became unappealable (at least for a 180-day period). In order to address this issue, the Rule placed the obligation on the prevailing party to provide notice to the losing party if he or she desired certainty in the event the clerk failed in his or her duty. As the Advisory Committee Notes explain:

> *The effect of the revisions is to place a burden on prevailing parties who desire certainty that the time for appeal is running.* Such parties can take the initiative to assure that their adversaries receive effective notice.[10]

Certainty can easily be achieved by any party for whom such certainty is important. As one commentator has explained:

> A winning party who desires certainty that the appeal time is running and who cannot know whether the other side has received notice from the clerk can themselves serve notice of the entry. The express reliance on notice from another

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duty because they discovered the entry of the order by monitoring the docket within the period of time prescribed by Rule 4(a)(6).

[10] *See* FED. R. CIV. P. 77 advisory committee's note, 134 F.R.D. 699 (emphasis added). Notably, the Appellees never provided notice to the Kuhns of the injunction order dated October 18, 2005.

> party creates a desirable incentive to adopt a routine practice of sending notice to all adverse parties.

16A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3950.6 (3d ed. 1998).

## II. Rule 4(a)(6)'s Problematic "May"

Unfortunately, Rule 4(a)(6) contains a hitch. Rule 4(a)(6) states that the district court "may" reopen the time to file an appeal if the rules' technical requirements are met. The word "may" in Rule 4(a)(6) suggests that a federal district court retains some discretion in denying relief even when the movant has met the conditions of the Rule. Courts of appeals have generally acknowledged such discretion. *Arai v. American Bryce Ranches, Inc.*, 316 F.3d 1066, 1069 (9th Cir. 2002); *Nunley v. City of Los Angeles*, 52 F.3d 792, 798 (9th Cir. 1995); *Avolio v. County of Suffolk*, 29 F. 3d 50 (2nd Cir. 1994); *In re Jones*, 970 F.2d 36, 39 (5th Cir. 1992); *see also* 16A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3950.6 (3d ed. 1998) ("it is clear that a district court has discretion to deny a Rule 4(a)(6) motion – even if all of Rule 4(a)(6)'s conditions are met").

## III. Denial of Rule 4(a)(6) Relief When the Rule's Elements Have Been Met: An Uncertain "I Know It When I See It" Standard

"Concluding that the district court has the discretion to deny [a Rule 4(a)(6)] motion even if the enumerated conditions are met, however, does not end [the] inquiry," as one court of appeals observed. *Arai*, 315 F.3d at 1069.

Consonant with notions of the Rule of Law, courts of appeal have observed that denial of a motion under Rule 4(a)(6) when the technical requirements of the rule are met, though discretionary, cannot be arbitrary. They recognize that such a denial remains subject to review for abuse of discretion under some standard. *Id.* at 1070 (citing *In re Stein,* 197 F.3d 421, 424 (9th Cir. 1999)); *Nunley,* 52 F.3d at 794.

As might be anticipated when courts seek to add requirements extrinsic to, *viz.,* not contained in, Rule 4(a)(6), the rule itself provides no guidance in fashioning a standard. "Although the text of Rule 4(a)(6) does not provide guidance on the scope of the district court's discretion," it is clear that the district court's "discretion is nonetheless limited." *Arai,* 316 F.3d at 1070 (citing *Nunley,* 52 F.3d at 798). Because Rule 4(a)(6) provides no guidance, however, that standard must be judicially crafted. It is axiomatic that in crafting such a standard, the provisions of Rule 4(a)(6) should not be contradicted by it.

Unfortunately, no court seems to know what the "standard" governing a district court's denial of Rule 4(a)(6) motions might be, and courts confronting the issue have ducked the opportunity to articulate such a standard. As a consequence, the standard has remained oddly elusive in the sixteen years since Rule 4(a)(6) was added in to the Rules of Appellate Procedure.

This judicial trepidation can hardly be exaggerated. There is a remarkable diffidence by the federal courts of appeal in articulating a standard that ought to govern district courts in deciding whether to exercise discretion in denying motions under FED. R. APP. P. 4(a)(6) when the rule's elements have been met. In expecting such a

standard from the courts one would think one is not trying to define what is undefinable. Yet the Sixth Circuit, like its sister courts, avoids articulating such a standard.

Apparently flummoxed by what Rule 4(a)(6)'s "may" encompasses, the Sixth Circuit avoided articulating the "precise contours of a district court's discretion to deny a Rule 4(a)(6) motion when the requirements of the Rule have been satisfied." App. 13. This echoes similar throes of inability expressed by the Second and Ninth Circuits. For example, in addressing what the district court may in its discretion consider in denying Rule 4(a)(6) relief when the Rule's elements have been met, the Ninth Circuit in *Arai* "decline[d] to speculate on what those [factors a court can use in denying a Rule 4(a)(6) motion] might be." *Arai,* 316 F.3d at 1070-71. The same lack of intrepidness in articulating the standard that ought to govern a district court in denying relief under Rule 4(a)(6) when its elements have been met is displayed by the Second Circuit. In *Avolio*, the Second Circuit deftly avoided "determin[ing] to what extent discretion may lie in the district court under this rule." *Avolio,* 29 F.3d at 54.

As it has developed, the state of Rule 4(a)(6) jurisprudence is all very redolent of Justice Potter Stewart's "I know it when I see it" jurisprudence.[11] One would think, however, that the standards governing the district courts' discretion in denying relief under Rule 4(a)(6) motions would be a little more certain than recognizing obscenity. When dealing with something as significant as an innocent litigant's loss of appellate rights arising from a clerk's failure to give notice, there ought to be more than a vague,

[11] *Jacobellis v. Ohio*, 378 U.S. 183 (1964) (Stewart, J., concurring).

*ad hoc*, ultimately useless "I know it when I see it" standard. This current state of affairs is not tenable. A district court's denial of a Rule 4(a)(6) motion should fall under the reasoned discipline of the Rule of Law, and not an "I know it when I see it" Rule of Arbitrariness. The Court should grant certiorari and articulate a standard to guide district courts in the exercise of discretion under FED. R. APP. P. 4(a)(6) when a party has complied with its elements.[12] With respect to the confusion engendered by the "may" in Rule 4(a)(6), like Moses Maimonides, this Court should write a *Guide for the Perplexed.*

## IV. The One Certain Rule Now Uncertain Because Sixth Circuit Departs From Second and Ninth Circuits

Though courts of appeal have refused to entertain the duty of crafting a general standard for denying Rule 4(a)(6) motions when the Rule's elements were met, courts of appeals at least provided some guidance as to what could not be considered. Following such a negative, *ad hoc* approach, there were few certainties. One of the few certainties that existed – at least until the Sixth Circuit's aberrant decision – was that a district court could not import Rule 4(a)(5)'s "excusable neglect or good cause" standard in exercising discretion to deny relief under Rule 4(a)(6) when the conditions to relief were otherwise met. *E.g., Nunley,* 52 F.3d at 79 (court cannot import "excusable

[12] Based upon a Westlaw search "4(a)(6) /s reopen /s appeal" in ALLFEDS database, Rule 4(a)(6) appears to have been the subject of 1009 appellate and district court opinions since adopted in 1991. The Rule of Law demands that there should be a workable standard to govern courts when applying a rule so often used. Denial of appellate rights ought to be based on more than mere whim.

neglect" standard); *Avolio v. County of Suffolk*, 29 F.3d 50, 52-54 (2nd Cir. 1994) (court cannot consider failure to monitor docket as grounds for denial of Rule 4(a)(6) motion); *see also* 16A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3950.6 (3d ed. 1998) ("district courts should not apply the 'good cause' or 'excusable neglect' standards of Rule 4(a)(5) in considering a motion brought under Rule 4(a)(6)").

In exercising their discretion in denying Rule 4(a)(6) motions when its technical requirements had been met, some district courts – like the district court in this case – imported an "excusable neglect" standard and denied relief based upon the movant's failure to give an adequate explanation for his or her failure to monitor the court's docket and learn of the entry of the judgment.[13] Until the Sixth Circuit injected its opinion into the mix, courts of appeal uniformly rejected district courts' efforts to import an "excusable neglect" standard as part of their exercise of discretion in denying relief under Rule 4(a)(6). Before the variance introduced by the Sixth Circuit, the Second and Ninth Circuits held that a district court abused its discretion in denying relief under Rule 4(a)(6) if, as part of the exercise of discretion, it required the movant to establish "excusable neglect" or some similar standard to explain why he or she failed to learn of the entry of the judgment sought to be appealed. As one court of appeals explained

[13] The "excusable neglect or good cause" standard found in FED. R. APP. P. 4(a)(5)(A)(ii) and FED. R. CIV. P. 60(b) is the standard imposed in overcoming the obligation that attorneys have to monitor the dockets and keep themselves informed as to the entry of orders that they wish to appeal so as to be entitled to the extraordinary relief under those rules.

why it was improper to bring in an "excusable neglect" standard:

> The word "may" [in FED. R. APP. P. 4(a)(6)] allows for discretion. To base that discretion, however, upon "excusable neglect" would undercut the rule. We need not reach the exact scope of the district court's discretion here. It is enough to state that the district judges have some discretion, but that where non-receipt has been proven and no other party would be prejudiced, the denial of relief cannot rest on a party's failure to learn independently of the entry of judgment during the thirty-day period for filing notices of appeal.

*Nunley*, 52 F.3d at 798.

Until the Sixth Circuit's opinion, courts of appeal were united in rejecting an "excusable neglect" standard in assessing denials of motions under Rule 4(a)(6). The rejection of an "excusable neglect" standard by the courts of appeal was predicated on the notion that the amendments to that rule were specifically designed to afford a party relief when the clerk's written notice was not sent or received as required by the Federal Rules of Civil Procedure and the prevailing party had not given written notice to opposing counsel. *See generally* 12 CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3084 (2d ed. 1987). The purpose of Rule 4(a)(6) was to provide "a limited opportunity for relief in circumstances where the notice of entry of a judgment or order . . . is either not received by a party or is received so late as to impair the opportunity to file a

timely notice of appeal."[14] Because relief under Rule 4(a)(6) was specifically designed to be *without regard to whether counsel complied with his duty to monitor the court's docket* it was wrong to consider the concept of "excusable neglect."[15] The courts of appeal unanimously reasoned that re-importing a duty to monitor the court's docket or requiring proof of "excusable neglect" to obtain relief under Rule 4(a)(6) when its technical requirements were met was a nullification of the clear intendment of the rule. Using an "excusable neglect" standard (or, what is the same thing, imposing a duty to monitor the court's docket) when denying Rule 4(a)(6) motions circumvented the very relief sought to be given litigants in adopting the 1991 amendments to Rule 4.

The Sixth Circuit rejected the entire *raison d'etre* behind Rule 4(a)(6). Though it recognized that the Second Circuit in *Avolio* and the Ninth Circuit in *Nunley* frowned upon district courts' denial of Rule 4(a)(6) relief on the grounds that counsel failed to monitor the docket, the Sixth Circuit was recalcitrant: "We decline to follow *Nunley* and *Avolio*." App. 11.

In rejecting the guidance of its sister courts of appeal, the Sixth Circuit noted that the CM/ECF system has greatly eased the burden in monitoring a court's docket. Gone are the days when an attorney had to leave his

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[14] FED. R. APP. P. 4 advisory committee's notes, 134 F.R.D. 738. *See* App. 31.

[15] That is obvious given the history and purpose of Rule 4(a)(6). Had an "excusable neglect" prong been intended under Rule 4(a)(6), the promulgators of the rule knew how to require that, as it is an express requirement of Rule 4(a)(5). The "excusable neglect" requirement is designedly absent from the requirements of Rule 4(a)(6).

office, hire runners, and undertake other onerous burdens in complying with his or her duty to monitor the court's docket. As a consequence, "[a]n interpretation of Rule 4(a)(6)," such as found in *Avolio* and *Nunley*, "that allowed parties to ignore *entirely* the electronic information at their fingertips would severely undermine the benefits for both courts and litigants fostered by the CM/ECF system." *Id.* (emphasis added).

There are at least three problems with the Sixth Circuit's reasoning.

First, as noted by *Avolio* and *Nunley,* the Sixth Circuit's importation of an "excusable neglect" standard into Rule 4(a)(6) motions directly conflicts with the Rule's text and its history and purpose, which was to get rid of the "excusable neglect" standard under the circumstances stated in Rule 4(a)(6).

Second, the reason given by the Sixth Circuit is specious. Nowhere do the holdings of *Avolio* and *Nunley* allow parties "to ignore *entirely* the electronic information at their fingertips" as the Sixth Circuit states. Under Rule 4(a)(6) as construed by *Avolio* and *Nunley,* parties must continue to monitor the docket – whether manually or electronically is of no moment – at least more often than once every 180 days. Rule 4(a)(6) is self-limiting. If a party fails to learn of a final judgment within 180 days of its entry by independently monitoring the docket, that party has no remedy. Accordingly, *Avolio* and *Nunley* do not allow any party "to ignore *entirely*" the docket.

Third, though unquestionably the advent of the CM/ECF system has greatly eased the burdens on counsel in monitoring the court's docket as the Sixth Circuit observes, the 180-day grace period given by Rule 4(a)(6) is not tied to the ease of complying with the monitoring of

the docket. The 180 days of Rule 4(a)(6) is 180 days. Implicit in the Sixth Circuit's ruling is that 180 days of Rule 4(a)(6) should no longer be 180 days, but because of CM/ECF it ought to be something less than 180 days.

Perhaps. But *that* decision – whatever its merit – should be made by the authority with the rule-making power, and not a subordinate court. Under the U.S. Constitution and the Acts of Congress, it is the Supreme Court, and not the Sixth Circuit or a district court, that "shall have the power to prescribe general rules of practice and procedure ... in the United States ... courts of appeals." 28 U.S.C. § 2072. By holding that the 180-day time period of Rule 4(a)(6) is no longer reasonable, and adopting in its stead an "excusable neglect" standard, the Sixth Circuit has, in effect, usurped the rule-making power of this Court. Temerariously, in affirming the district court and rejecting *Nunley* and *Avolio,* the Sixth Circuit has implicitly amended Rule 4(a)(6).

The Sixth Circuit's *ad hoc* rule has no basis in the text of Rule 4(a)(6). Moreover, it adds to the confusion in 4(a)(6) jurisprudence not only by refusing to articulate a standard for the exercise of due discretion, but also by rejecting the only certain construction given to that rule by the Second and Ninth Circuits. Relying on the history of Rule 4 and the advisory committee notes, the Second and Ninth Circuits have held that, in exercising discretion to *deny* a Rule 4(a)(6) motion when all its elements have been met, a district cannot import the "excusable neglect" standard applicable to motions under Rule 4(a)(5). In other words, the Second and Ninth Circuits have held that, if the provisions of Rule 4(a)(6) are met, the district court cannot deny relief because counsel failed in his or her duty to monitor the docket. Rule 4(a)(6) was added to the Federal

Rules of Appellate Procedure effective December 1, 1991, with the express purpose of relieving counsel from the strict duty of monitoring the court's docket and removing the "excusable neglect" standard. The Second and Ninth Circuits espouse the better rule.

## CONCLUSION

The district court abused its discretion in denying the Kuhns their motion to reopen the time to file a notice of appeal under FED. R. APP. P. 4(a)(6) so that they could appeal the district court's permanent injunction. The Kuhns met the requirements of FED. R. APP. P. 4(a)(6). The district court abused its discretion by holding that it had the discretion to deny relief under that rule, even though all its provisions had been met, based upon the failure of the Kuhns independently to monitor the district court's docket. In effect, this adds an "excusable neglect" standard onto FED. R. APP. P. 4(a)(6) that the 1991 amendments to FED. R. APP. P. 4(a) were intended to remove, thus constituting an abuse of discretion. The Sixth Circuit erred in affirming the district court's denial of the Kuhns' Rule 4(a)(6) motion. Its reasoning is infirm. The Sixth Circuit's opinion contradicts the express purpose of Rule 4(a)(6), and constitutes an arrogation of this Court's rule-making power. Additionally, the Sixth Circuit's opinion conflicts with the opinions of the Ninth and Second Circuits.

For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

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## APPENDICES

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*RECOMMENDED FOR FULL-TEXT PUBLICATION*
Pursuant to Sixth Circuit Rule 206

File Name: 07a0306p.06

**UNITED STATES COURT OF APPEALS**

FOR THE SIXTH CIRCUIT

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|---|---|
| SUSAN F. KUHN; MICHAEL KUHN, *Plaintiffs-Appellants,* | |
| *v.* | No. 06-3576 |
| SULZER ORTHOPEDICS, INC., *Defendant-Appellee,* | |
| TOMMY JACKS, Individually; TOMMY JACKS, P.C.; MITHOFF & JACKS, L.L.P., *Appellees.* | |

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 01-09000 – Kathleen McDonald O'Malley, District Judge

Argued: June 8, 2007

Decided and Filed: August 10, 2007

Before: BATCHELDER and COLE, Circuit Judges;
PHILLIPS, District Judge.*

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## COUNSEL

**ARGUED:** Andrew M. Greenwell, HARRIS & GREENWELL, Corpus Christi, Texas, for Appellants. Thomas S. Kilbane, SQUIRE, SANDERS & DEMPSEY, Cleveland,

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* The Honorable Thomas W. Phillips, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Ohio, for Appellees. **ON BRIEF:** Andrew M. Greenwell, HARRIS & GREENWELL, Corpus Christi, Texas, for Appellants. Thomas S. Kilbane, SQUIRE, SANDERS & DEMPSEY, Cleveland, Ohio, David W. Brooks, SHOOK HARDY & BACON, Kansas City, Missouri, Manuel Lopez, SHOOK HARDY & BACON, Houston, Texas, for Appellees.

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## OPINION

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R. GUY COLE, JR., Circuit Judge. Appellants Susie and Michael Kuhn (collectively, the "Kuhns") appeal the district court's order denying their motion, brought under Federal Rule of Appellate Procedure 4(a)(6), to reopen the time to file an appeal of the district court's order enjoining them from obtaining certain discovery from Appellee Sulzer Orthopedics, Inc. ("Sulzer") and from prosecuting certain claims in their Texas state-court action against their former lawyer, Appellee Tommy Jacks. The Kuhns argue that the district court abused its discretion in denying their motion to reopen because they satisfied all the requirements of Rule 4(a)(6) and their counsel had no duty to monitor periodically the district court's docket for orders affecting the Kuhns's legal rights that they might have wanted to appeal. For the reasons described below, we **AFFIRM** the judgment of the district court.

## I. BACKGROUND

Susie Kuhn is a Texas resident who was an absent class member (i.e., not a named class representative) in a certified settlement class action against Sulzer in connection with allegations that Sulzer's orthopedic hip implants

were defective. Kuhn retained Tommy Jacks, a Texas attorney, to represent her against Sulzer.

Numerous lawsuits against Sulzer were filed in state and federal courts throughout the country. These cases were centralized in the Northern District of Ohio on June 19, 2001, by order of the Multi-District Litigation ("MDL") Panel. On May 8, 2002, the district court granted final approval to a negotiated settlement, certified the settlement class, and specified an exclusion date by which all class members who did not wish to be bound by the settlement were required to opt-out.

Jacks advised Kuhn that she could obtain more compensation by remaining part of the class, rather than opting-out and litigating her claims against Sulzer on an individual basis. Although apparently reluctant at first, Kuhn and her husband Michael ultimately took Jacks's advice and agreed to remain part of the class. The Kuhns received $320,000 under the *Sulzer* settlement in connection with two surgeries that Susie had undergone because of Sulzer's defective hip implants. In addition, the Kuhns were entitled to receive additional compensation (up to $800,000) under the *Sulzer* settlement, owing to the extraordinary injuries Susie sustained. Jacks, however, failed to timely file Susie's claim under the settlement's "Extraordinary Injury Fund" ("EIF") and therefore she was barred from obtaining the additional relief to which she was entitled.

Thereafter, the Kuhns retained their current counsel, James Harris, and filed an action against Jacks in Texas state court asserting various claims, including legal malpractice. In addition to failing to timely file Susie's EIF claim, the Kuhns alleged that Jacks breached his duties to

represent the Kuhns's *individual* interests, rather than just the interests of the class as a whole. In the course of prosecuting their Texas state-court action against Jacks, the Kuhns sought discovery from non-party Sulzer about the negotiation and implementation of the *Sulzer* class-action settlement. Sulzer, believing that the discovery sought by the Kuhns implicated questions exclusively within the continuing jurisdiction of the MDL district court, filed an emergency motion before the MDL court to enjoin the discovery. The MDL court issued a temporary injunction and scheduled a hearing for August 17, 2005. At the August 17 hearing, the court ruled that the Kuhns could pursue their malpractice claim against Jacks on the theory that he failed to timely file their EIF claim, but could not pursue their various other claims against Jacks "because to do so would: (1) be tantamount to an appeal of this Court's earlier Orders [regarding the *Sulzer* class action] and (2) be in breach of § 15.3 of the Settlement Agreement." (Joint Appendix ("J.A.") 625, 631.) Thus, to the extent that the Kuhns's state-court case against Jacks represented a collateral attack on the MDL court's judgment in *Sulzer,* the MDL court enjoined the prosecution of the Kuhns's state-court claims pursuant to its authority to do so under its prior orders and the All Writs Act, 28 U.S.C. § 1651(a).

The MDL court orally issued its ruling on August 17 and stated that a written, appealable order would follow. On October 6, 2005, the Kuhns filed a motion with the court requesting that it issue its written order so that the Kuhns could proceed with their appeal. On October 18, 2005, the district court did so ("Injunction Order").

Under Federal Rule of Appellate Procedure 4(a)(1), the Kuhns had until November 17, 2005 – thirty days from

the issuance of the district court's Injunction Order – to file their notice of appeal. However, because Harris, the Kuhns's counsel, did not receive notice of the entry of the district court's Injunction Order, the deadline for filing a notice of appeal passed without any action by Harris. Harris first learned about the Injunction Order on January 6, 2006, when a paralegal in his office discovered the order while reviewing the district court's electronic docket. Accordingly, on January 10, 2006, the Kuhns filed a motion to reopen the time to file an appeal under Federal Rule of Appellate Procedure 4(a)(6). The district court denied that motion on March 14, 2006. *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig. ("In re Sulzer")*, No. 1:01-CV-9000, 2006 U.S. Dist. LEXIS 10712 (N.D. Ohio Mar. 14, 2006). The district court concluded that "Harris is not entitled to a reopening of the appeal period, because his failure to learn timely of the Court's filing of the *October Injunction Order* is largely of his own making." *Id.* at *13. The court reasoned that (1) pursuant to its first MDL Practice and Procedure Order, Harris had a duty to take the "elementary step" of registering his email address with the court's Case Management/Electronic Case Filing ("CM/ECF") system so that he would obtain email notifications of filings, including the court's orders, *id.* at *10-11; and (2) Harris had an affirmative duty to monitor the docket, especially "where [he] took the step of filing a motion asking the Court to promptly issue the promised ruling." *Id.* at *13.

On April 12, 2006, the Kuhns appealed the district court's denial of their Rule 4(a)(6) motion to reopen and the district court's issuance of the Injunction Order. Sulzer moved in this Court to dismiss the Kuhns's appeal as to the Injunction Order, which we granted on October 18,

2006. Thus, the only question before us is whether the district court erred in denying the Kuhns's motion to reopen.

## II. DISCUSSION

### A. Standard of Review

We review the district court's denial of the Kuhns's Rule 4(a)(6) motion to reopen the time to appeal under an abuse-of-discretion standard. *Martin v. Straub,* 27 Fed. App'x 337, 338 (6th Cir.2001) (citing *Nunley v. City of Los Angeles,* 52 F.3d 792, 794 (9th Cir.1995)). A district court abuses its discretion when it relies on clearly erroneous findings of fact, when it improperly applies the law, or when it uses an erroneous legal standard. *Romstadt v. Allstate Ins. Co.,* 59 F.3d 608, 615 (6th Cir.1995).

### B. Merits

1. *Rule 4(a)(6)*

Rule 4(a)(6) was added to the Federal Rules of Appellate Procedure by amendment effective December 1, 1991. It provides:

> *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

Rule 4(a)(6) "is intended to reduce substantially the risk that any opportunity to appeal will be forfeited by failure to receive notice of the entry of judgment." 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3950.6 (3d ed.1998).

2. *The District Court Did not Abuse its Discretion in Denying the Kuhns's Motion to Reopen*

As described above, Rule 4(a)(6) specifies three conditions that must be met before a district court may exercise its discretion to reopen the time to file an appeal. The district court below did not make specific findings as to whether the Kuhns satisfied all these requirements. Appellees, however, do not dispute that the Kuhns did so and, on the record before us, we have no trouble concluding as much: Harris filed an affidavit with the district court stating that he did not receive notice of the district court's entry of its Injunction Order, *see* Fed. R. App. P. 4(a)(6)(A); the Kuhns filed their motion to reopen within 180 days of the issuance of the Injunction Order and within seven days of discovering the entry of the order, *see* Fed. R. App. P. 4(a)(6)(B); and Appellees do not contend that they would be prejudiced if the Kuhns's motion to reopen were granted, *see* Fed. R. App. P. 4(a)(6)(C).

Where the Kuhns have satisfied Rule 4(a)(6)'s express conditions, the only question is whether the district court abused its discretion in nonetheless denying their motion. Importantly, the Kuhns concede that the Rule's permissive language, which states that a district court "may reopen the time to file an appeal" if its conditions are satisfied, means that the district court retains discretion to deny a Rule 4(a)(6) motion even where a movant has complied with all three express conditions. We agree. *See Evans v. United States,* No. 96-1962, 1998 U.S. App. LEXIS 21618, at *8 n.3 (6th Cir. Aug. 28, 1998) (per curiam) (commenting that Rule 4(a)(6) "states that a district court 'may' reopen the time for appeal, not that it must"); *Arai v. Am. Bryce Ranches, Inc.,* 316 F.3d 1066, 1069 (9th Cir. 2003) (holding that "the district court has the discretion to deny a Rule 4(a)(6) motion even when the rule's requirements are met"); *In re Jones,* 970 F.2d 36, 39 (5th Cir. 1992) ("Rule 4(a)(6) allows the district court to grant relief if the specified requirements are satisfied, but the rule does not require the district court to grant the relief, even if the requirements are met.").

Although the Kuhns concede that Rule 4(a)(6) preserves a district court's discretion even where the movant has satisfied the Rule's requirements, they challenge the reasons provided by the district court here in support of its exercise of discretion, namely, that (1) Harris was required to register with the court's CM/ECF system as a condition of his practicing before the district court, and that (2) Harris had a duty to monitor the docket. It is to these issues that we now turn.

*(a) The District Court's MDL Practice and Procedure Order*

The district court's ruling was premised in part on the conclusion that, where Harris had been admitted *pro hac vice* to practice before the district court, he had an obligation to register for CM/ECF so that he would receive e-mail notifications of the court's or other parties' docket filings. Referring to its Practice and Procedure Order, the district court stated that, "[t]he very first Order this Court entered in this case states that 'Counsel **must** be able to receive notice from the Court via e-mail.'" *In re Sulzer*, 2006 U.S. Dist. LEXIS 10712, at *11 (quoting Practice and Procedure Order).

In his affidavit filed in support of the Kuhns's motion to reopen the time to appeal, Harris admits that he did not register with the district court's CM/ECF system because he "does not have the scanners or software meeting the technical requirements necessary to accomplish electronic filing." (J.A. 250.) Appellees respond that even if Harris lacked the capacity to *file* documents electronically with the district court, he was still required to register with the CM/ECF system so that he could *receive* e-mail notifications of the court's orders as well as notifications of other parties' electronic filings. Indeed, argue Appellees, there is no excuse for Harris's failure to register where he concedes that he had an e-mail address at which he was able to receive electronic communications.

We agree with Harris that the district court's Practice and Procedure Order did not compel him to register with the court's CM/ECF system. By its very terms, that order applies only to (1) actions originally transferred to the district court by the Judicial Panel on Multidistrict Litigation ("JPML"), (2) tag-along actions transferred to the

district court by the JPML, (3) related cases originally or subsequently filed in the district court, and (4) related cases transferred or removed to the district court. (J.A. 264.) The Kuhns's Texas suit does not fit within any of these categories; indeed, the Kuhns appeared in the federal MDL court only because Sulzer filed a motion there to prevent the Kuhns from obtaining certain discovery. Thus, the Kuhns were not bound by the court's Practice and Procedure Order and therefore Harris was not required to register with the court's CM/ECF system as a condition of practicing before the court.

If the district court's exercise of discretion is to be sustained, it must be on the basis of the second reason the court gave for denying the Kuhns's motion.

*(b) Harris's Duty to Monitor the Docket*

The district court also held that under the law of this Circuit, "'parties have an affirmative duty to monitor the dockets to inform themselves of the entry of orders they may wish to appeal.'" *In re Sulzer,* 2006 U.S. Dist. LEXIS 10712, at *11 (quoting *Reinhart v. U.S. Dep't of Agric.,* 39 Fed. App'x 954, 956 (6th Cir.2002) (per curiam)). In *Reinhart,* we dismissed the appeal for not having been timely filed even though the appellant was tardy in part because the clerk mistakenly sent him an order from an unrelated case. *Reinhart,* 39 Fed. App'x at 955-56. We held that because the statutory deadline for filing an appeal was "mandatory and jurisdictional," we had no choice but to dismiss the untimely appeal despite the equities that favored the appellant. *Id.* at 956. Further, we held that the clerk's mailing error did not

> completely excuse Reinhart's untimely notice of appeal, because 'parties have an affirmative duty to monitor the dockets to inform themselves of the entry of orders they may wish to appeal. . . . Therefore, the failure of a court clerk to give notice of entry of an order is not a ground, by itself, to warrant finding an otherwise untimely appeal to be timely.'

*Id.* (quoting *In re Delaney*, 29 F.3d 516, 518 (9th Cir. 1994)); *accord In re Jamison*, No. 93-5259, 1993 U.S. App. LEXIS 31195, at *5 (6th Cir. Nov. 24, 1993) (order) (stating that "each party has an independent duty to monitor the progress of his case").

The Kuhns argue that the district court erred in holding that they had a duty to monitor the docket because such a holding amounts to importing Rule 4(a)(5)'s "excusable-neglect" standard into Rule 4(a)(6). The Kuhns cite to decisions from the Second and Ninth Circuits holding that the concept of excusable neglect is inapplicable to Rule 4(a)(6) and that therefore, although a district court has discretion to deny a Rule 4(a)(6) motion, that denial cannot be based on a party's "failure to learn independently of the entry of judgment during the thirty-day period for filing notices of appeal." *Nunley,* 52 F.3d at 798; *accord Avolio v. County of Suffolk,* 29 F.3d 50, 54 (2d Cir.1994) (holding that a district court's exercise of discretion "may not be based on a concept of inexcusable [sic] neglect for not having learned of the entry of judgment").

We decline to follow *Nunley* and *Avolio.* Both cases were decided long before electronic dockets became widely available which, as the district court noted, do not even require an attorney "to leave the seat in front of his computer" to keep apprised of what is happening in his

cases. *In re Sulzer,* 2006 U.S. Dist. LEXIS, at *12. An interpretation of Rule 4(a)(6) that allowed parties to ignore entirely the electronic information at their fingertips would severely undermine the benefits for both courts and litigants fostered by the CM/ECF system, including ease and speed of access to all the filings in a case. In addition, such an interpretation would defy common sense: It might be one thing not to penalize a party who did not learn about the issuance of an appealable order in the bygone days of hiring "'runners' to physically go to the courthouse to check the docket," but here all Harris had to do was register his email address with the district court's CM/ECF system to receive the court's orders. *Id.* Failing that, Harris simply had to scan periodically the electronic docket for recent activity. Indeed, the unreasonableness of Harris's conduct here is evident in that ultimately, he learned about the district court's Injunction Order in precisely this way: His paralegal checked the online docket and discovered the order.

One further consideration prompts us to conclude that the district court did not abuse its discretion in denying the Kuhns's motion to reopen. As described above, Harris filed a motion with the district court on October 6, 2005, asking it to enter its written Injunction Order so that the Kuhns could file their appeal. At this point, had Harris been diligent, he would have regularly consulted the docket to see if the district court had responded to his request and issued its order. It exceeds the bounds of reason to say that a party who takes the unusual step of asking a court to promptly issue a written order may then disclaim all responsibility for taking any action to see if the request has been honored, especially where, as here, all Harris had to do was check the online docket.

We do not reach the precise contours of a district court's discretion to deny a Rule 4(a)(6) motion when the requirements of the Rule have been satisfied. We do hold, however, that the district court did not abuse its discretion in denying the Kuhns's motion where their counsel opted not to register his email address with the Court's EM/ECF system and then failed to monitor the electronic docket.

## III. CONCLUSION

For the reasons set forth above, we **AFFIRM** the judgment of the district court denying the Kuhns's motion to reopen the time to file their appeal.

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| **IN RE: SULZER HIP PROSTHESIS AND KNEE PROSTHESIS LIABILITY LITIGATION** | : | **Case No. 1:01-CV-9000** |
| | : | **(MDL Docket No. 1401)** |
| | : | **JUDGE O'MALLEY** |
| | : | **MEMORANDUM AND ORDER** |

As explained at length in an Order dated October 18, 2005 ("*October Injunction Order*," docket no. 3018), plaintiff class member Susan Kuhn has filed a legal malpractice action in Texas state court against her former attorney, Tommy Jacks. In the *October Injunction Order,* the Court granted motions by Jacks and defendant Sulzer Orthopedics, Inc.[1] for permanent injunctive relief, prohibiting Kuhn from pursuing certain discovery and from prosecuting certain claims.[2]

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[1] Sulzer Orthopedics, Inc. was later renamed Centerpulse Orthopedics, Inc., and the purchased by Zimmer Holdings, Inc., The Court refers to the defendant as "Sulzer."

[2] Specifically, the *October Injunction Order* stated as follows:

> * * * Kuhn is hereby permanently enjoined from pursuing claims for fraud, misrepresentation, breach of fiduciary duty, deceptive trade practices, or similar legal theories against Jacks, whether in connection with her existing Texas lawsuit or any other lawsuit. Further, Kuhn is enjoined from challenging (whether directly or indirectly) in her Texas lawsuit or any other lawsuit, and from pursuing discovery regarding: (1) the propriety of, basis for, or amount of any common benefit fee awards; (2) the adequacy of Notice to class members of the terms of the Settlement Agreement; and (3) the fairness, adequacy, or reasonableness of any provision contained in the Settlement Agreement.

*October Kuhn Order* at 23.

Kuhn now moves to reopen the time within which she may file an appeal from the *October Injunction Order* (docket no. 3050). For the reasons stated below, this motion is **DENIED**.

## I. Procedural History.

On July 25, 2005, Sulzer filed an emergency motion seeking to enjoin Kuhn from pursuing certain discovery in her Texas state court malpractice action against Jacks. The Court granted the motion by entering a temporary injunction, *see* docket no. 2961 ("*Kuhn Injunction Order*"), and scheduled a hearing on August 17, 2005 to determine the propriety of continuing the injunctive relief. Before the August hearing, attorney Jacks also filed a motion for injunctive relief, essentially asking for the same relief as had Sulzer in its emergency motion. In addition, Kuhn filed a motion for reconsideration of the *Kuhn Injunction Order*.

At the close of the hearing on August 17, 2005, the Court issued an oral ruling prohibiting Kuhn from engaging in "discovery relating to [her] current claims." Hearing tr. at 39. The Court further stated that it needed more time to assess "the scope of the claim that is still available to . . . Kuhn and . . . the jurisdiction in which that claim can be asserted." *Id.* at 38. Accordingly, the Court explained that its oral ruling was not a final, appealable order. Rather, the Court would issue a full analysis in a written order, from which Kuhn could seek to take an appeal if she desired. *Id.* at 39 ("[t]his won't be a final order until I issue the written decision").

On October 6, 2005, Kuhn filed a motion asking the Court to issue its promised written opinion so that she

could take an appeal. *See* docket no. 3015 at 4 ("Kuhn respectfully requests that this Court exercise its duty to enter a written order . . . in order that Movant may take such actions as are necessary to protect her rights, including, but not limited to, seeking review of the propriety of such an order by virtue of 28 U.S.C. §1292(a)(1), which authorizes appeals from interlocutory orders"). On October 18, 2005, the Court mooted Kuhn's motion by doing as she asked and issuing the *October Injunction Order.* As noted, the *October Injunction Order* permanently enjoined Kuhn from pursuing certain discovery and from prosecuting certain claims.

Pursuant to Fed. R. App. Pro. 4(a)(1), Kuhn had 30 days to file a notice of appeal from the *October Injunction Order,* giving her a deadline of November 17, 2005. Kuhn did not file a notice of appeal before the deadline. On January 6, 2006, however, Kuhn invoked Fed. R. App. Pro. 4(a)(6) and moved the Court to reopen the period within which she could file her notice of appeal.[3]

## II. Analysis.

Kuhn's attorney, James Harris, submits an affidavit stating he never received a copy of the Court's *October Injunction Order* and only learned on January 6, 2006 that it had been issued. Specifically, Harris's paralegal was reviewing the Court's electronic docket via the internet

[3] Kuhn did not rely on Fed. R. App. Pro. 4(a)(5), which allows a district court to *extend* the 30-day period within which to file a notice of appeal, because the motion for an extension under this rule must itself be filed within 30 days of the expiration of the original 30-day period. Given the timing of her motion, Kuhn's only option was to reopen the time within which to appeal, pursuant to Fed. R. App. Pro. 4(A)(6).

and informed Harris that the *October Injunction Order* had issued over two months earlier. Harris then filed his motion to reopen on January 10, 2006.[4]

In August of 2005, in order to defend against Jacks' and Sulzer's motions for injunctive relief, Harris filed a motion for admission pro hac vice, which this Court granted. *See* docket no. 2967. As an attorney admitted to practice before this Court in connection with this case, Harris had an obligation to monitor the case docket and to comply with the Court's Practice and Procedure Orders entered in the case. The very first Order this Court entered in this case states that "Counsel **must** be able to receive notice from the Court via e-mail." Docket no. 3 at 2.

Harris's motion for pro hac vice shows that he has an email address. That Harris's paralegal found the Court's *October Injunction Order* via the internet shows that Harris's office is familiar with the use of ECF and PACER, which allows easy review of the Court's docket. In order to receive automatic email notifications of Court Orders upon their filing, Harris (or his paralegal) merely needed to enter his email address on the docket via ECF. Apparently, however, Harris failed to take this elementary step.

The law is clear that "[p]arties have an affirmative duty to monitor the dockets to inform themselves of the entry of orders they may wish to appeal." *Reinhart v. U.S.*

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[4] Fed. R. App. Pro. 4(a)(6)(A) states that a district court may reopen the time to file an appeal if the motion seeking reopening "is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier." The Court accepts Kuhn's motion to reopen as timely filed.

*Dept. of Agriculture,* 2002 WL 1492097 at *2 (6th Cir. July 10 2002), *cert. denied,* 538 U.S. 979 (2003) (quoting *In re Delaney,* 29 F.3d 516, 518 (9th Cir. 1994)). *See also In re Jamison,* 1993 WL 492342 at *2 (6th Cir. Nov. 24, 1993) ("failure [by the Court] to notify a party of the entry of judgment" does not extend the time for appeal, "as each party has an independent duty to monitor the progress of his case") (*citing Alaska Limestone Corp. v. Hodel,* 799 F.2d 1409, 1411-12 (9th Cir. 1986)). Unlike a decade ago, when law firms often hired "runners" to physically go to the courthouse to check the docket, monitoring the docket of a federal case today does not require an attorney even to leave the seat in front of his computer. Harris failed to undertake his simple duty of checking the docket, and he has not given a good explanation for his failure to do so. Rule 4(a)(6) states that a "district court *may* reopen the time to file an appeal" if certain conditions are met. The Sixth Circuit Court of Appeal has observed that "[t]he rule states that a district court 'may' reopen the time for appeal, not that it must," even if all the requirements of Rule 4(a)(6) are met. *Evans v. United States,* 1998 WL 598712 at *3 n.3 (6th Cir. Aug. 28, 1998); *see also Benavides v. Bureau of Prisons,* 79 F.3d 1211, 1214 (D.C. Cir. 1996) ("[i]f in a particular case the movant is at fault . . . then the district court may in its discretion, deny relief under Rule 4(a)(6)").

In this case, the Court concludes, in its discretion, that Harris is not entitled to a reopening of the appeal period, because his failure to learn timely of the Court's filing of the *October Injunction Order* is largely of his own making. Especially where Harris took the step of filing a motion asking the Court to promptly issue the promised ruling, it is not too much to ask that Harris fulfill his own

obligation to monitor the docket for that ruling. Accordingly, the motion for reopening is denied.

**IT IS SO ORDERED.**

/s/ Kathleen M. O'Malley
**KATHLEEN MCDONALD O'MALLEY**
**UNITED STATES DISTRICT JUDGE**

**DATED:** March 14, 2006

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-3576

(Filed Aug. 10, 2007)

SUSAN F. KUHN; MICHAEL KUHN,
Plaintiffs – Appellants,

v.

SULZER ORTHOPEDICS, INC.,
Defendant – Appellee,

TOMMY JACKS, Individually; TOMMY JACKS, P.C.;
MITHOFF & JACKS, L.L.P.,
Appellees.

Before: BATCHELDER and COLE, Circuit Judges;
PHILLIPS, District Judge.

**JUDGMENT**

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

**ENTERED BY ORDER OF THE COURT**

/s/ Leonard Green
Leonard Green, Clerk

## Rule 4. Appeal as of Right – When Taken

**(a) Appeal in a Civil Case.**

**(1) Time for Filing a Notice of Appeal.**

**(A)** In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

**(B)** When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

**(C)** An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

**(2) Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.

**(3) Multiple Appeals.** If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

**(4) Effect of a Motion on a Notice of Appeal.**

**(A)** If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of

the order disposing of the last such remaining motion:

**(i)** for judgment under Rule 50(b);

**(ii)** to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

**(iii)** for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

**(iv)** to alter or amend the judgment under Rule 59;

**(v)** for a new trial under Rule 59; or

**(vi)** for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

**(B)(i)** If a party files a notice of appeal after the court announces or enters a judgment – but before it disposes of any motion listed in Rule 4(a)(4)(A) – the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

**(ii)** A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal – in compliance with Rule 3(c) – within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

**(5) Motion for Extension of Time.**

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

**(6) Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

**(B)** the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

**(C)** the court finds that no party would be prejudiced.

**(7) Entry Defined.**

**(A)** A judgment or order is entered for purposes of this Rule 4(a):

**(i)** if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

**(ii)** if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

**(B)** A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

* * *

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7111, 102 Stat. 4419; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

## ADVISORY COMMITTEE NOTES

### 1967 Adoption

**Subdivision (a).** This subdivision is derived from FRCP 73(a) [rule 73(a), Federal Rules of Civil Procedure, this title] without any change of substance. The requirement that a request for an extension of time for filing the notice of appeal made after expiration of the time be made by motion and on notice codifies the result reached under the present provisions of FRCP 73(a) and 6(b) [rules 73(a) and 6(b), Federal Rules of Civil Procedure]. *North Umberland Mining Co. v. Standard Accident Ins. Co.*, 193 F.2d 951 (9th Cir., 1952); *Cohen v. Plateau Natural Gas Co.*, 303 F.2d 273 (10th Cir., 1962); *Plant Economy, Inc. v. Mirror Insulation Co.*, 308 F.2d 275 (3d Cir., 1962).

Since this subdivision governs appeals in all civil cases, it supersedes the provisions of § 25 of the Bankruptcy Act (11 U.S.C. § 48). Except in cases to which the United States or an officer or agency thereof is a party, the change is a minor one, since a successful litigant in a bankruptcy proceeding may, under § 25, oblige an aggrieved party to appeal within 30 days after entry of judgment – the time fixed by this subdivision in cases involving private parties only – by serving him with notice of entry on the day thereof, and by the terms of § 25 and aggrieved party must in any event appeal within 40 days

after entry of judgment. No reason appears why the time for appeal in bankruptcy should not be the same as that in civil cases generally. Furthermore, § 25 is a potential trap for the uninitiated. The time for appeal which it provides is not applicable to all appeals which may fairly be termed appeals in bankruptcy. Section 25 governs only those cause [sic] referred to in § 24 as "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy." *Lowenstein v. Reikes*, 54 F.2d 481 (2d Cir., 1931), cert. den., 285 U.S. 539, 52 S.Ct. 311, 76 L.Ed. 932 (1932). The distinction between such cases and other cases which arise out of bankruptcy is often difficult to determine. See 2 Moore's Collier on Bankruptcy ¶ 24.12 through ¶ 24.36 (1962). As a result it is not always clear whether an appeal is governed by § 25 or by FRCP 73(a) [rule 73(a), Federal Rules of Civil Procedure, this title], which is applicable to such appeals in bankruptcy as are not governed by § 25.

In view of the unification of the civil and admiralty procedure accomplished by the amendments of the Federal Rules of Civil Procedure effective July 1, 1966, this subdivision governs appeals in those civil actions which involve admiralty or maritime claims and which prior to that date were known as suits in admiralty.

The only other change possibly effected by this subdivision is in the time for appeal from a decision of a district court on a petition for impeachment of an award of a board of arbitration under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), 45 U.S.C. § 159. The act provides that a notice of appeal from such a decision shall be filed within 10 days of the decision. This singular provision was apparently repealed by the enactment in 1948 of 28 U.S.C. § 2107, which fixed 30 days from the date of entry of judgment as the time for appeal in all actions a civil nature except

actions in admiralty or bankruptcy matters or those in which the United States is a party. But it was not expressly repealed, and its status is in doubt. See 7 Moore's Federal Practice ¶ 73.09[2] (1966). The doubt should be resolved, and no reason appears why appeals in such cases should not be taken within the time provided for civil cases generally.

* * *

**1979 Amendment**

**Subdivision (a)(1).** The words "(including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein)," which appear in the present rule are struck out as unnecessary and perhaps misleading in suggesting that there may be other categories that are not either civil or criminal within the meaning of Rule 4(a) and (b).

The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "or." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case may be, following the entry of the judgment or order appealed from. See Notes to Rule 4(a)(2) and (4), below.

**Subdivision (a)(2).** The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely. Despite the absence of such a provision in

Rule 4(a) the courts of appeals quite generally have held premature appeals effective. See, e.g., *Matter of Grand Jury Empanelled Jan. 21, 1975*, 541 F.2d 373 (3d Cir. 1976); *Hodge v. Hodge*, 507 F.2d 87 (3d Cir. 1976); *Song Jook Suh v. Rosenberg*, 437 F.2d 1098 (9th Cir. 1971); *Ruby v. Secretary of the Navy*, 365 F.2d 385 (9th Cir. 1966); *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 269 (9th Cir. 1965).

The proposed amended rule would recognize this practice but make an exception in cases in which a post trial motion has destroyed the finality of the judgment. See Note to Rule 4(a)(4) below.

**Subdivision (a)(4).** The proposed amendment would make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion. Since the proposed amendments to Rules 3, 10, and 12 contemplate that immediately upon the filing of the notice of appeal the fees will be paid and the case docketed in the court of appeals, and the steps toward its disposition set in motion, it would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from. See, e.g., *Keith v. Newcourt*, 530 F.2d 826 (8th Cir. 1976). Under the present rule, since docketing may not take place until the record is transmitted, premature filing is much less likely to involve waste effort. See, e.g. *Stockes v. Peyton's Inc.*, 508 F.2d 1287 (5th Cir. 1975). Further, since a notice of appeal filed before the disposition of a post trial motion, even if it were treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion, it is obviously preferable to postpone the notice of appeal until after the motion is disposed of.

The present rule, since it provides for the "termination" of the "running" of the appeal time, is ambiguous in its application to a notice of appeal filed prior to a post trial motion filed within the 10 day limit. The amendment would make it clear that in such circumstances the appellant should not proceed with the appeal during pendency of the motion but should file a new notice of appeal after the motion is disposed of.

**Subdivision (a)(5).** Under the present rule it is provided that upon a showing of excusable neglect the district court at any time may extend the time for the filing of a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by the rule, but that if the application is made after the original time has run, the order may be made only on motion with such notice as the court deems appropriate.

A literal reading of this provision would require that the extension be ordered and the notice of appeal filed within the 30 day period, but despite the surface clarity of the rule, it has produced considerable confusion. See the discussion by Judge Friendly in In re Orbitek, 520 F.2d 358 (2d Cir. 1975). The proposed amendment would make it clear that a motion to extend the time must be filed no later than 30 days after the expiration of the original appeal time, and that if the motion is timely filed the district court may act upon the motion at a later date, and may extend the time not in excess of 10 days measured from the date on which the order granting the motion is entered.

Under the present rule there is a possible implication that prior to the time the initial appeal time has run, the district court may extend the time on the basis of an

informal application. The amendment would require that the application must be made by motion, though the motion may be made *ex parte*. After the expiration of the initial time a motion for the extension of the time must be made in compliance with the F.R.C.P. [Federal Rules of Civil Procedure] and local rules of the district court. See Note to proposed amended Rule 1, *supra*. And see Rules 6(d), 7(b) of the F.R.C.P. [rules 6(d) and 7(b), Federal Rules of Civil Procedure].

The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the granting of other extensions of time under Rule 26(b) seems to be more appropriate.

**Subdivision (a)(6).** The proposed amendment would call attention to the requirement of Rule 58 of the F.R.C.P. [Federal Rules of Civil Procedure] that the judgment constitute a separate document. See *United States v. Indrelunas*, 411 U.S. 216 (1973). When a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) and if not, so advise all parties and the district judge. While the requirement of Rule 58 is not jurisdictional, (see *Bankers Trust Co. v. Mallis*, 431 U.S. 928 (1977)), compliance is important since the time for the filing of a notice of appeal by other parties is measured by the time at which the judgment is properly entered.

**1991 Amendment**

The amendment provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. The amendment adds a new subdivision (6) allowing a district court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. By "prejudice" the Committee means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

Reopening may be ordered only upon a motion filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal and enables any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment, as authorized by Fed.R.Civ.P. 77(d). Winning parties are encouraged to send their own notice in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. Receipt of a winning party's notice will shorten only the time for

reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.

If the motion is granted, the district court may reopen the time for filing a notice of appeal only for a period of 14 days from the date of entry of the order reopening the time for appeal.

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**Transmittal Note:** Upon transmittal of this rule to Congress, the Advisory Committee recommends that the attention of Congress be called to the fact that language in the fourth paragraph of 28 U.S.C. § 2107 might appropriately be revised in light of this proposed rule.

**1993 Amendment**

**Note to Paragraph (a)(1).** The amendment is intended to alert readers to the fact that paragraph (a)(4) extends the time for filing an appeal when certain posttrial motions are filed. The Committee hopes that awareness of the provisions of paragraph (a)(4) will prevent the filing of a notice of appeal when a posttrial tolling motion is pending.

**Note to Paragraph (a)(2).** The amendment treats a notice of appeal filed after the announcement of a decision or order, but before its formal entry, as if the notice had been filed after entry. The amendment deletes the language that made paragraph (a)(2) inapplicable to a notice of appeal filed after announcement of the disposition of a posttrial motion enumerated in paragraph (a)(4) but before the entry of the order, see *Acosta v. Louisiana Dep't of Health & Human Resources*, 478 U.S. 251 (1986) (per curiam); *Alerte v. McGinnis*, 898 F.2d 69 (7th Cir.1990).

Because the amendment of paragraph (a)(4) recognizes all notices of appeal filed after announcement or entry of judgment – even those that are filed while the posttrial motions enumerated in paragraph (a)(4) are pending – the amendment of this paragraph is consistent with the amendment of paragraph (a)(4).

**Note to Paragraph (a)(3).** The amendment is technical in nature; no substantive change is intended.

**Note to Paragraph (a)(4).** The 1979 amendment of this paragraph created a trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending. The 1979 amendment requires a party to file a new notice of appeal after the motion's disposition. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). Many litigants, especially pro se litigants, fail to file the second notice of appeal, and several courts have expressed dissatisfaction with the rule. See, e.g., *Averhart v. Arrendondo*, 773 F.2d 919 (7th Cir.1985); *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 746 F.2d 278 (5th Cir.1984), cert. denied, 479 U.S. 930 (1986).

The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.

Because a notice of appeal will ripen into an effective appeal upon disposition of a posttrial motion, in some

instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a posttrial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, the Committee does not believe that an additional notice of appeal is needed.

The amendment provides that a notice of appeal filed before the disposition of a posttrial tolling motion is sufficient to bring the underlying case, as well as any orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Paragraph (a)(4) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is served within 10 days after entry of judgment. This eliminates the difficulty of determining whether a posttrial motion made within 10 days after entry of a judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. The amendment comports with the practice in several circuits of treating

all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). See, e.g., *Finch v. City of Vernon*, 845 F.2d 256 (11th Cir.1988); *Rados v. Celotex Corp.*, 809 F.2d 170 (2d Cir.1986); *Skagerberg v. Oklahoma*, 797 F.2d 881 (10th Cir.1986). To conform to a recent Supreme Court decision, however – *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988) – the amendment excludes motions for attorney's fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed.R.Civ.P. 58.

* * *

**1995 Amendment**

**Subdivision (a).** Fed.R.Civ.P. 50, 52, and 59 were previously inconsistent with respect to whether certain postjudgment motions had to be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) spoke of making or serving such motions rather than filing them. Civil Rules 50, 52, and 59, are being revised to require filing before the end of the 10-day period. As a consequence, this rule is being amended to provide that 'filing' must occur within the 10 day period in order to affect the finality of the judgment and extend the period for filing a notice of appeal.

The Civil Rules require the filing of postjudgment motions 'no later than 10 days after entry of judgment' – rather than 'within' 10 days – to include postjudgment motions that are filed before actual entry of the judgment by the clerk. This rule is amended, therefore, to use the same terminology.

The rule is further amended to clarify the fact that a party who wants to obtain review of an alteration or amendment of a judgment must file a notice of appeal or amend a previously filed notice to indicate intent to appeal from the altered judgment.

**1998 Amendments**

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; in this rule, however, substantive changes are made in paragraphs (a)(6) and (b)(4), and in subdivision (c).

**Subdivision (a), paragraph (1).** Although the Advisory Committee does not intend to make any substantive changes in this paragraph, cross-references to Rules 4(a)(1)(B) and (4)(c) have been added to subparagraph (a)(1)(A).

**Subdivision (a), paragraph (4).** Item (iv) in subparagraph (A) of Rule 4(a)(4) provides that filing a motion for relief under Fed.R.Civ.P. 60 will extend the time for filing a notice of appeal if the Rule 60 motion is filed no later than 10 days after judgment is entered. Again, the Advisory Committee does not intend to make any substantive change in this paragraph. But because Fed.R.Civ.P. 6(a) and Fed.R.App.P. 26(a) have different methods for computing time, one might be uncertain whether the 10-day period referred to in Rule 4(a)(4) is computed using Civil Rule 6(a) or Appellate Rule 26(a). Because the Rule 60 motion is filed in the district court, and because Fed.R.App.P. 1(a)(2)

says that when the appellate rules provide for filing a motion in the district court, "the procedure must comply with the practice of the district court," the rule provides that the 10-day period is computed using Fed.R.Civ.P. 6(a)

**Subdivision (a), paragraph (6).** Paragraph (6) permits a district court to reopen the time for appeal if a party has not received notice of the entry of judgment and no party would be prejudiced by the reopening. Before reopening the time for appeal, the existing rule requires the district court to find that the moving party was entitled to notice of the entry of judgment and did not receive it "from the clerk or any party within 21 days of its entry." The Advisory Committee makes a substantive change. The finding must be that the movant did not receive notice "from the district court or any party within 21 days after entry." This change broadens the type of notice that can preclude reopening the time for appeal. The existing rule provides that only notice from a party or from the clerk bars reopening. The new language precludes reopening if the movant has received notice from "the court."

* * *

**2002 Amendments**

**Subdivision (a)(1)(C).** The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying

the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated

that it has become " 'difficult to conceive of a situation' " in which the writ " 'would be necessary or appropriate.' " *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

**Changes Made After Publication and Comments** No changes were made to the text of the proposed amendment or to the Committee Note.

**Subdivision (a)(4)(A)(vi).** Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10-day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

**Changes Made After Publication and Comments** No changes were made to the text of the proposed amendment or to the Committee Note.

**Subdivision (a)(5)(A)(ii).** Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the

extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought during the 30 days following the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir. 1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5). But the Advisory Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a

notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or during the 30 days following the expiration of the original deadline.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

The good cause and excusable neglect standards have "different domains." *Lorenzen v. Employees Retirement Plan*, 896 F.2d 228, 232 (7th Cir. 1990). They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault – excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.

Thus, the good cause standard can apply to motions brought during the 30 days following the expiration of the original deadline. If, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good

cause to seek a post-expiration extension. It may be unfair to make such a movant prove that its "neglect" was excusable, given that the movant may not have been neglectful at all. Similarly, the excusable neglect standard can apply to motions brought prior to the expiration of the original deadline. For example, a movant may bring a pre-expiration motion for an extension of time when an error committed by the movant makes it unlikely that the movant will be able to meet the original deadline.

**Changes Made After Publication and Comments** No changes were made to the text of the proposed amendment. The stylistic changes to the Committee Note suggested by Judge Newman were adopted. In addition, two paragraphs were added at the end of the Committee Note to clarify the difference between the good cause and excusable neglect standards.

**Subdivision (a)(7).** Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a judgment must be set forth on a separate document. Rule 4(a)(7) and Fed. R. Civ. P. 58 have been amended to resolve those splits.

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is

treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter "camp" disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. If Fed. R. Civ. P. 58 does not require that a judgment or order be set forth on a separate document, then neither does Rule 4(a)(7); the judgment or order will be deemed entered for purposes of Rule 4(a) when it is entered in the civil docket. If Fed. R. Civ. P. 58 requires that a judgment or order be set forth on a separate document, then so does Rule 4(a)(7); the judgment or order will not be deemed entered for purposes of Rule 4(a) until it is so set forth and entered in the civil docket (with one important exception, described below).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the postjudgment motions listed in new Fed. R. Civ. P. 58(a)(1) (which postjudgment motions include, but are not limited to, the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A)) do not have to be set forth on separate documents. *See* Fed. R. Civ. P.

58(a)(1). Thus, such orders are entered for purposes of Rule 4(a) when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Rule 4(a)(7)(A)(1).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order – or the time to bring post-judgment motions, such as a motion for a new trial under Fed. R. Civ. P. 59 – ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g., United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds*, 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Both Rule 4(a)(7)(A) and Fed. R. Civ. P. 58 have been amended to impose such a cap. Under the amendments, a judgment or order is generally treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not treated as entered until it is set forth on a separate document (in

addition to being entered in the civil docket) or until the expiration of 150 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal (or to bring a postjudgment motion) when a court fails to set forth a judgment or order on a separate document in violation of Fed. R. Civ. P. 58(a)(1).

3. The third circuit split – this split addressed only by the amendment to Rule 4(a)(7) – concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be set forth on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request that judgment be set forth on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*,

*Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without waiting for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to set forth the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move that the judgment be set forth on a separate document, and appeal from that judgment within

30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g., Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been set forth on a separate document but was not. *See, e.g., Haynes*, 158 F.3d at 1330-31; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

The Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

**Changes Made After Publication and Comments**
No changes were made to the text of proposed Rule 4(a)(7)(B) or to the third or fourth numbered sections of the Committee Note, except that, in several places, references to a judgment being "entered" on a separate document were changed to references to a judgment being "set forth" on a separate document. This was to maintain stylistic consistency. The appellate rules and the civil rules

consistently refer to "entering" judgments on the civil docket and to "setting forth" judgments on separate documents.

Two major changes were made to the text of proposed Rule 4(a)(7)(A) – one substantive and one stylistic. The substantive change was to increase the "cap" from 60 days to 150 days. The Appellate Rules Committee and the Civil Rules Committee had to balance two concerns that are implicated whenever a court fails to enter its final decision on a separate document. On the one hand, potential appellants need a clear signal that the time to appeal has begun to run, so that they do not unknowingly forfeit their rights. On the other hand, the time to appeal cannot be allowed to run forever. A party who receives no notice whatsoever of a judgment has only 180 days to move to reopen the time to appeal from that judgment. *See* Rule 4(a)(6)(A). It hardly seems fair to give a party who *does* receive notice of a judgment an unlimited amount of time to appeal, merely because that judgment was not set forth on a separate piece of paper. Potential appellees and the judicial system need *some* limit on the time within which appeals can be brought.

The 150-day cap properly balances these two concerns. When an order is not set forth on a separate document, what signals litigants that the order is final and appealable is a lack of further activity from the court. A 60-day period of inactivity is not sufficiently rare to signal to litigants that the court has entered its last order. By contrast, 150 days of inactivity is much less common and thus more clearly signals to litigants that the court is done with their case.

The major stylistic change to Rule 4(a)(7) requires some explanation. In the published draft, proposed Rule 4(a)(7)(A) provided that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered for purposes of Rule 58(b) of the Federal Rules of Civil Procedure." In other words, Rule 4(a)(7)(A) told readers to look to FRCP 58(b) to ascertain when a judgment is entered for purposes of starting the running of the time to appeal. Sending appellate lawyers to the civil rules to discover when time began to run for purposes of the appellate rules was itself somewhat awkward, but it was made more confusing by the fact that, when readers went to proposed FRCP 58(b), they found this introductory clause: "Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 when. . . ."

This introductory clause was confusing for both appellate lawyers and trial lawyers. It was confusing for appellate lawyers because Rule 4(a)(7) informed them that FRCP 58(b) would tell them when the time begins to run for purposes of the *appellate* rules, but when they got to FRCP 58(b) they found a rule that, by its terms, dictated only when the time begins to run for purposes of certain *civil* rules. The introductory clause was confusing for trial lawyers because FRCP 58(b) described when judgment is entered for some purposes under the civil rules, but then was completely silent about when judgment is entered for other purposes.

To avoid this confusion, the Civil Rules Committee, on the recommendation of the Appellate Rules Committee, changed the introductory clause in FRCP 58(b) to read simply: "Judgment is entered for purposes of *these Rules*

when. . . ." In addition, Rule 4(a)(7)(A) was redrafted[1] so that the triggering events for the running of the time to appeal (entry in the civil docket, and being set forth on a separate document or passage of 150 days) were incorporated directly into Rule 4(a)(7), rather than indirectly through a reference to FRCP 58(b). This eliminates the need for appellate lawyers to examine Rule 58(b) and any chance that Rule 58(b)'s introductory clause (even as modified) might confuse them.

We do not believe that republication of Rule 4(a)(7) or FRCP 58 is necessary. In *substance*, rewritten Rule 4(a)(7)(A) and FRCP 58(b) operate identically to the published versions, except that the 60-day cap has been replaced with a 150-day cap – a change that was suggested by some of the commentators and that makes the cap more forgiving.

* * *

**2005 Amendments**

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find

[1] A redraft of Rule 4(a)(7) was faxed to members of the Appellate Rules Committee two weeks after our meeting in New Orleans. The Committee consented to the redraft without objection.

that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what type of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what type of "notice" triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

**Subdivision (a)(6)(A).** Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one substantive change has been made. As amended, the subdivision will preclude a party from moving to reopen the time to appeal a judgment or order only if the party receives (within 21 days) formal notice of the entry of that judgment or order under Civil Rule 77(d). No other type of notice will preclude a party.

The reasons for this change take some explanation. Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party

did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" – that is, the notice required by Civil Rule 77(d) – but instead referred to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* type of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what type of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B) – new subdivision (a)(6)(A) – has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after

that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

**Subdivision (a)(6)(B).** Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made: The subdivision now makes clear that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period to move to reopen the time to appeal.

The circuits have been split over what type of "notice" is sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g., Lowry v.*

*McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 304-05 (2d Cir. 1999)).

Former subdivision (a)(6)(A) – new subdivision (a)(6)(B) – has been amended to resolve this circuit split by providing that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period. Using Civil Rule 77(d) notice as the trigger has two advantages: First, because Civil Rule 77(d) is clear and familiar, circuit splits are unlikely to develop over its meaning. Second, because Civil Rule 77(d) notice must be served under Civil Rule 5(b), establishing whether and when such notice was provided should generally not be difficult.

Using Civil Rule 77(d) notice to trigger the 7-day period will not unduly delay appellate proceedings. Rule 4(a)(6) applies to only a small number of cases – cases in which a party was not notified of a judgment or order by either the clerk or another party within 21 days after entry. Even with respect to those cases, an appeal cannot be brought more than 180 days after entry, no matter what the circumstances. In addition, Civil Rule 77(d) permits parties to serve notice of the entry of a judgment or order. The winning party can prevent Rule 4(a)(6) from even coming into play simply by serving notice of entry within

21 days. Failing that, the winning party can always trigger the 7-day deadline to move to reopen by serving belated notice.